Supreme Court, U.S.
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No.

In the
SUPREME COURT OF THE UNITED STATES

October Term, 1999

STEPHEN A. ROBBINS, *Petitioner,*
Hull Maintenance Technician Third Class
U.S. Navy
v.

UNITED STATES OF AMERICA, *Respondent.*

Petition for a Writ of Certiorari to the
United States Court of Appeals for the Armed Forces

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a military officer assigned to a two-to-three year tour of duty as a "judge" in a court-martial can be presumed to know and apply the law when he fails to exclude expert and lay opinion that an alleged child victim of sexual abuse is telling the truth and has been abused.

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Petition for a Writ of Certiorari to the
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PETITION FOR A WRIT OF CERTIORARI

Stephen A. Robbins petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Armed Forces.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Armed Forces [USCAAF], reported at 52 M.J. 455 (2000), is located at Appendix A (1a-8a). The opinion of the Navy-Marine Corps Court of Criminal Appeals [NMCCA], not reported, is located at Appendix B (9a-20a).

JURISDICTION

The USCAAF entered its judgment on April 7, 2000. This Court's jurisdiction is invoked under 28 U.S.C. § 1259(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment of the Constitution provides in part:

> No person shall be . . . deprived of life, liberty or property, without due process of law . . . .

Military Rule of Evidence 608(a) provides in part:

> The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

Military Rule of Evidence 701 provides in part:

> If the witness is not testifying as an expert, the testimony of the witness in the form of opinions or inference is limited to those opinions or inference which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the testimony of the witness of the determination of a fact in issue.

Military Rule of Evidence 703 provides in part:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

STATEMENT

Petitioner's stepdaughter alleged that he forced her twice to perform oral sodomy on him. A clinical social worker testified regarding her role in investigating the stepdaughter's allegations. As part of her duties, the social worker presented information to the members of a child sexual abuse committee. On direct examination by government counsel, the social worker described the process as follows:

> [The committee members] make a determination of whether a situation is substantiated or unsubstantiated. There's a group, I think, 12 to 15 people who are clinical practitioners who listen to the information and then determine whether the child is credible and, therefore, if credible, it would be a substantiation. If not credible, it would be unsubstantiated.

Record at 443. The social worker then confirmed that the committee had, in fact, substantiated the stepdaughter's molestation by Petitioner. *Id.*

Another witness -- a family acquaintance to whom the stepdaughter disclosed the alleged abuse -- testified as follows in response to questions by government counsel:

> Q. After [the stepdaughter] had disclosed these things to you, what happened over the course of the next week?
>
> A. I didn't know what to do or who to tell 'cause
>
> Q. And why was that?
>
> A. At that point I did not know the whole story. All I knew was what she told me, and I -- that the two people that I would have told she said knew. Therefore, who was I going to tell? I tried to call the bishop. I couldn't get through to him. So, therefore, I was left in just -- I felt like I was in turmoil for a week 'cause I really didn't know what to do and who to tell. So –
>
> Q. Did you think [the stepdaughter] was lying about what she told you?
>
> A. No. It didn't sound like a lie. It didn't sound like it was made up. It didn't sound like it was a rehearsed.

Record at 340.

The United States Court of Appeals for the Armed Forces [USCAAF] affirmed the findings and sentence in Petitioner's case on April 7, 2000. *United States v. Robbins*, 52 M.J. 455 (2000). The USCAAF held there was no plain error in the admission of the challenged testimony or, alternately, that any error in admitting the testimony was harmless. *Robbins*, 52 M.J. at 457, 458. The USCAAF's holding was based on the fact that Petitioner had elected court-martial by military judge alone in accordance with Article 16, Uniform Code of Military Justice, 10 U.S.C. § 816 (1994). *Id.*

REASONS FOR GRANTING THE PETITION

The USCAAF erred in relying upon a presumption that a military judge knows and correctly applies the law to find that the introduction of otherwise inadmissible evidence was neither erroneous nor prejudicial.

In military practice, it is well established that opinions of a child victim's credibility regarding allegations of sexual abuse or of the ultimate issue of an accused's guilt are inadmissible. It is plain error for experts in a sexual abuse case to testify that a victim's allegations are "founded" or that there is no evidence that the victim has been coached. *United States v. Birdsall*, 47 M.J. 404 (1998). Such testimony places an "undeserved scientific stamp of approval" on the victim's credibility and the ultimate issue of the accused's guilt, especially in a case where the issue of guilt boils down to a credibility contest between the alleged victim and the accused. *Id.* at 410.

The rationale for this rule has varied. Generally, however, it is the "interaction between the Military Rules of Evidence 608(a), as it pertains to character evidence; 404, as it pertains to confusing the triers of fact (usurping their function); and the 700-series as they pertain to the use of experts" which determine the inadmissibility of such evidence. *United States v. Arruza*, 26 M.J. 234, 238 (C.M.A. 1988). Nothing in these rules of evidence suggest that they are inapplicable to a court-martial by military judge alone. Nonetheless, the USCAAF relied upon Petitioner's choice of forum to find that admission of expert testimony regarding his stepdaughter's credibility and his guilt was neither erroneous nor prejudicial.

The USCAAF erred in enacting a rule that military judges are presumed to know and correctly apply the law and are further presumed not to have relied on inadmissible evidence in deciding the question of guilt or innocence. No statutory or regulatory support can be found in military law for such a presumption. Moreover, application of such a presumption to courts-martial would constitute an improper extension of the judicial powers of the United States to non-Article III tribunals.

A court-martial is merely a "special statutory tribunal, with limited powers". *Collins v. McDonald*, 258 U.S. 416, 418 (1922). This Court has found "nothing in the history or constitutional treatment of military tribunals which entitles them to rank along with Article III courts..." *Toth v. Quarles*, 350 U.S. 11, 17 (1955). Specifically, the role of a military "judge" -- a position that has officially existed only

since passage of the Military Justice Act of 1968 -- is more germane to that of any other military officer than to the office of full-time civilian judges. *Weiss v. United States*, 510 U.S. 163, 169-176 (1994).[1]

Alternately, if the presumption that a military judge as a trier of fact knows and correctly applies the law is not facially invalid, the USCAAF erred in applying it to Petitioner's case. In Petitioner's case, the social worker testified that the allegations had been "substantiated", i.e., verified or established by proof or competent evidence. This finding was directly linked to a determination of the victim's credibility vis-à-vis Petitioner's. Additionally, the substantiation of the allegations did not simply reflect a single expert's opinion but carried with it the imprimatur of 12 to 15 other similarly qualified experts. Accordingly, the expert's opinion cannot simply be discounted as "background" information serving as foundational matter for a later hearsay exception necessary to admit the contents of the social worker's interview with the stepdaughter as statements for medical diagnosis or treatment. *Robbins*, 52 M.J. at 456.

In fact, government counsel never offered the evidence on that basis. Indeed, after the social worker testified that the allegations had been substantiated,

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[1] *Cf. United States v. Weiss*, 36 M.J. 224, 229 (C.M.A. 1992)("When trying a case without members, the military judge sits as a one-member court-martial....When sitting as a one-member general court-martial or special court-martial, the military judge's authority is derived from the court-martial to which he is detailed, not from his status as a military judge.").

government counsel explored the treatment not of the stepdaughter but of Petitioner. The social worker testified that the committee had determined Petitioner was not amenable to treatment because he had denied the allegations. Record at 445. Because it stands to reason that no treatment would be necessary if the committee had determined the alleged acts had not occurred, the social worker's testimony that Petitioner was not amenable to treatment was yet another impermissible opinion regarding his credibility and guilt.

It is true that at a subsequent point in the trial, the military judge indicated that he would "give very little weight to [the social worker's] testimony." The military judge's comment, however, was made in response to defense counsel's closing argument on the unreliability of the social worker's recollection of her interview with the stepdaughter and the lack of notes or other records to corroborate her testimony. In this context, the military judge's comment is evidence that he gave the social worker's testimony some weight and -- shorn of all details regarding the stepdaugher's interview -- the essence of the social worker's testimony was that 12 to 15 experts believed the stepdaughter was credible and the Petitioner was guilty.

Moreover, the erroneous admission of the social worker's testimony was compounded by the erroneous admission of the testimony of another witness, a family acquaintance to the whom the stepdaughter disclosed the alleged abuse. This witness opined that the stepdaughter's account of being sexually abused "didn't sound like a lie", "didn't sound like it was made up", and "didn't sound like it was rehearsed". Record at 340. The USCAAF erred in finding that this testimony was not an improper comment on the credibility of the stepdaughter in that it was presented

not for the truth of the matter asserted but "to indicate why [the witness] took the action she did or behaved the way she did subsequently." *Robbins*, 52 M.J. at 455.

In fact, government counsel asked the witness whether she believed the stepdaughter was lying not in an attempt to explain actions the witness took but the actions she failed to take after hearing the stepdaughter's allegations. The witness testified that after hearing the allegations she waited a week before she reported them to anyone. Record at 340-41. Government counsel elicited several excuses from the witness before finally asking whether the delay in waiting was due to the witness' failing to believe the stepdaughter.

The witness then gave the response at issue: "No. It didn't sound like a lie...." Thus, government counsel intended the witness' response to stand exactly for the truth of the matter specifically asserted, namely, that the witness deemed the stepdaughter's allegations credible. As such, government counsel's question and the response represented impermissible bolstering. The USCAAF erred in finding this testimony admissible simply because the stepdaughter's account to this particular witness was not itself admitted as substantive evidence.

Under similar circumstances, the military courts of criminal appeals have declined to employ the presumption that a military judge knows and applies the law correctly where he errs in admitting improper expert opinions on the credibility of the alleged victims in a child sexual abuse case. *See e.g. United States v. Littlewood*, No. 32763 (A.F. Ct. Crim. App. 11 Mar 99)(unpublished op.)(located at Appendix C, 21a-31a). The presumption has also been held not to arise where the military judge gives some indication he

misunderstood the evidence to be admissible and there were none of the "oft-found acknowledgements by the military judge that he would limit his consideration to the extent he might find permissible in his deliberations, if any at all." *United States v. Branoff*, 34 M.J. 612, 627 (A.F.C.M.R. 1992), set aside and remanded on other grounds, 38 M.J. 98 (C.M.A. 1993).

As recognized by the military judge in Petitioner's case, the stepdaughter's credibility was "key to this case." Record at 755. Yet, on at least two distinct occasions, the military judge erroneously admitted impermissible opinions on the credibility of the stepdaughter and the guilt of the Petitioner. Significantly, the military judge's admission of this evidence was unaccompanied by the commentary he otherwise employed throughout the record to indicate his acknowledgment of inadmissible evidence or evidence admitted for a limited purpose.[2] The improper opinions of

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[2] Record at 157 (If the testimony ventures "into any sort of uncharged misconduct that would be impermissible for me to consider, I will disregard it."); Record at 248 ("I can totally disregard any impermissible use of that information."); Record at 464 (social worker's case notes found inadmissible); Record at 480 ("I'm not going to listen to profile evidence counsel."); Record at 215-217, 515-524 (videotape of victim interview found inadmissible); Record at 533 ("Well, if what you are getting at is child development, why don't you ask her specifically about child development, and don't even get into any issues of credibility, because I agree with [defense counsel] that the form of that question suggested, maybe, a credibility prong, and I'm going to sustain it as to the form."); Record at 703 ("I wouldn't allow him to testify he believes him.").

the stepdaughter's credibility so influenced the military judge that he was moved to vouch for her at the conclusion of the court-martial by declaring :

> First and foremost, I want to say that all of the children who testified in this case were, in the court's view, being absolutely truthful. They were all wonderful, bright, respectful, honest children, [the stepdaughter] especially so. She's a wonderful little girl who loves her stepfather even today. She was not lying nor was she manipulating in this courtroom in the court's view. I found her to be totally credible. Even her recantations are easily explainable in this case considering the family and church pressure which she must have had to endure, whether perceived or real.

Record at 864.

CONCLUSION

The presumption that a military judge knows and correctly applies the law is facially invalid given the nature of courts-martial and military judges. Alternately, the USCAAF erred in applying the presumption to the facts of Petitioner's case. The fact that the military courts of criminal appeals have declined to apply the presumption in similar cases suggests that those courts are more mindful of the proper limits of their role in the administration of military justice than the USCAAF. Accordingly, to ensure the proper administration of military justice,

Petitioner respectfully requests the Court grant this petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX A

U.S. COURT OF APPEALS FOR THE ARMED FORCES

No. 99-0421

Crim.App. No. 97 00652

Stephen A. ROBBINS, Hull Maintenance Technician Third Class, U.S. Navy, *Appellant*

v.

United States, *Appellant*

Argued Dec. 10, 1999
Decided Apr. 7, 2000

For Appellant: *Lieutenant Commander R. C. Klant*, JAGC, USN (argued).

For Appellee: *Lieutenant James E. Grimes*, USNR (argued); *Colonel Kevin M. Sandkuhler*, USMC, and *Commander Eugene E. Irvin*, JAGC, USN (on brief).

Opinion of the Court

EFFRON, Judge:

A general court-martial composed of a military judge sitting alone convicted appellant, contrary to his pleas, of 2

specifications of sodomy with a child under the age of 16 years and 1 specification of dishonorably failing to pay a just debt, in violation of Articles 125 and 134, Uniform Code of Military Justice, *10 USC* §§ *25* and 934, respectively. He was sentenced to a dishonorable discharge, confinement for 7 years, total forfeitures, and reduction to the lowest enlisted grade. The convening authority approved these results, and the Court of Criminal Appeals affirmed in an unpublished opinion.

On appellant's petition, we granted review of the following issues:

I

WHETHER THE LOWER COURT ERRED IN FINDING THAT IT WAS NOT PLAIN ERROR FOR THE MILITARY JUDGE TO ADMIT A WITNESS'S TESTIMONY THAT THE CHILD ABUSE ALLEGATIONS AGAINST APPELLANT WERE CLINICALLY SUBSTANTIATED.

II

WHETHER THE LOWER COURT ERRED IN FINDING THAT IT WAS NOT PLAIN ERROR FOR THE MILITARY JUDGE TO ADMIT A WITNESS'S TESTIMONY THAT SHE BELIEVED THE VICTIM.

We affirm for the reasons set forth below.

I. BACKGROUND

A. The Testimony at Issue

In this judge-alone trial, the victim of the charged sodomies, appellant's 7-year-old stepdaughter, testified and provided detailed information concerning both incidents. In

support of the victim's credibility, the prosecution sought to offer into evidence statements made by the victim and her mother to Ms. Winona Gilliam, a clinical social worker who had counseled them both. The defense objected to the hearsay nature of Ms. Gilliam's repetition of the statements made by the victim and her mother. See Mil. R. Evid. 801-802, Manual for Courts-Martial, United States (1998 ed.) The prosecution responded that the statements were admissible as exceptions to the hearsay rule under Mil. R. Evid. 803(4) (statements made for purposes of medical treatment) and 803(6) (business records). In an effort to establish a foundation for admitting the hearsay statements under these exceptions, the prosecution offered the testimony of Ms. Gilliam concerning the circumstances surrounding the making of the statements.

As part of this background, Ms. Gilliam stated that she became involved in the case when the victim's mother requested counseling for her daughter and herself concerning the sexual abuse allegations. According to Ms. Gilliam, her role, as part of the "child sexual abuse team," involved meeting with the parties, ascertaining facts, and offering referrals for counseling. She testified that she kept notes of the counseling sessions that were reviewed by the "child sexual abuse case review committee," which included 12-15 clinical practitioners.

In the course of describing the circumstances surrounding the hearsay statements, she testified -- without defense objection -- that the child sexual abuse case review committee was responsible for determining the credibility of allegations. She added that if the committee determined that the allegations were substantiated, it would ascertain the safety of the victim and the amenability of the perpetrator to treatment. The committee also was

responsible for making a treatment referral for both the victim and the perpetrator.

Trial counsel then asked Ms. Gilliam whether in this particular case the allegation was "substantiated, clinically." There was no defense objection, and she gave an affirmative response.

The military judge ruled that the hearsay testimony relating the statements made by the victim and her mother to Ms. Gilliam did not constitute business records under Mil. R. Evid. 803(6) but concluded that the statements were admissible under the medical treatment exception in Mil. R. Evid. 803(4). At a subsequent point in the trial, the military judge indicated that he would "give very little weight to [Ms. Gilliam's] testimony."

The second granted issue concerns the testimony of Ms. Yolanda Crossley, a friend of the family. The victim first disclosed the abuse allegations to Ms. Crossley, who waited 1 week before she disclosed the allegations to the victim's mother. That disclosure led to the charges in this case.

The prosecution sought to introduce Ms. Crossley's testimony as to what the victim told her on the grounds that the victim's hearsay statements were admissible under Mil. R. Evid. 803(2) (excited utterance). After repeated unsuccessful attempts to lay a proper foundation for this testimony, the military judge did not permit Ms. Crossley to testify as to the victim's statements.

The prosecution then sought to use the statements for the limited purpose of setting forth the sequence of events to explain why Ms. Crossley delayed for a week in reporting the information to the victim's mother. The prosecution stated that it was offering her testimony "not for the truth of the matter, but to indicate then why Ms. Crossley took the action she did, or behaved the way she

did subsequently." The military judge agreed to admit the statements for this limited purpose, emphasizing that he would "not consider anything that she may testify to for the *truth of what [the victim] told her.*"

In the context of testifying for this limited purpose, Ms. Crossley provided information concerning her conversation with the victim, and explained why she did not inform anyone about the allegations for approximately a week. In the course of her testimony, she was asked whether she thought the victim "was lying about what she told you." There was no defense objection to this question, and Ms. Crossley responded: "No. It didn't sound like a lie. It didn't sound like it was made up. It didn't sound like it was rehearsed." Later in her testimony, when the prosecution asked Ms. Crossley about appellant's credibility, the defense objected. The military judge sustained the objection, noting that the witness could not serve as "a human lie detector machine."

B. Plain Error

The defense objections at trial concerned the hearsay nature of the testimony offered by Ms. Crossley and Ms. Gilliam as to the content of statements made by the victim and the victim's mother. The propriety of the military judge's ruling on the hearsay questions is not at issue in the present appeal. The granted issues concern other statements made by the witnesses, not objected to by the defense, concerning assessments of the credibility of the victim.

As a general matter, error may not be predicated upon the admission of testimony unless there is a timely objection on the record. Mil. R. Evid. 103(a)(1). As an exception, an appellate court may take notice of plain error even though not brought to the attention of the military judge if the appellant demonstrates that there was an error, that the error was plain ("clear" or "obvious"), and that the error

materially prejudiced the substantial rights of the appellant. *United States v. Powell, 49 M.J. 460, 463-65 (1998).* See Art. 59(a), UCMJ, *10 USC* § *859*(a); Mil. R. Evid. 103(d).

When the issue of plain error involves a judge-alone trial, an appellant faces a particularly high hurdle. A military judge is presumed to know the law and apply it correctly, is presumed capable of filtering out inadmissible evidence, and is presumed not to have relied on such evidence on the question of guilt or innocence. See *United States v. Raya, 45 M.J. 251, 253 (1996).* As a result, "plain error before a military judge sitting alone is rare indeed." Id.; see *United States v. Cacy, 43 M.J. 214, 218 (1995)* (citing *United States v. Cardenas, 9 F.3d 1139, 1156 (5th Cir. 1993),* reh'g en banc denied, *15 F.3d 1081 (1994),* cert. denied, *511 U.S. 1134 (1994)).*

C. Expert Testimony on Credibility

We have previously noted that an "expert in child abuse may not act as a human lie detector for the court-martial. . . . Child-abuse experts are not permitted to opine as to the credibility or believability of victims or other witnesses." *United States v. Birdsall, 47 M.J. 404, 410 (1998)* (citing *United States v. Harrison, 31 M.J. 330, 332 (CMA 1990)); United States v. Arruza, 26 M.J. 234 (CMA 1988); United States v. Petersen, 24 M.J. 283* [*458] *(CMA 1987).* Such testimony exceeds the scope of an expert's qualifications, violates the limits on character evidence under Mil. R. Evid. 608(a), and usurps the exclusive responsibility of the court-martial panel to weigh evidence and determine credibility. *Birdsall, 47 M.J. at 410.* The same considerations would apply to conclusions as to guilt or innocence offered by a nonexpert.

II. DISCUSSION

In *Birdsall*, we concluded that prejudicial plain error occurred when the military judged admitted into evidence expert-opinion testimony that the accused's sons' complaints of sexual abuse were truthful. Id. The present case, however, is distinguishable from *Birdsall*. In *Birdsall*, the case was tried before a court-martial panel, where the prejudicial impact of testimony that arguably usurped the panel's factfinding function would be at its greatest. Id. The present case, however, was tried by a military judge sitting alone, who presumably knew the well-established law concerning the limits of expert testimony. *See Raya, supra.*

Moreover, while the testimony of the witnesses in *Birdsall* focused on the credibility of the victim, the witnesses in the present case were called by the prosecution in an effort to have them testify as to the out-of-court statements made by the victim, the victim's mother, and appellant. The statements touching upon credibility were incidental to the prosecution's efforts to establish a foundation for admissibility of the statements under pertinent exceptions to the hearsay rule, see Mil. R. Evid. 803(2),(4), and (6), and to explain the sequence of events.

As the Fifth Circuit noted in Cardenas, a trial judge "is presumed to have rested his verdict only on the admissible evidence before him and to have disregarded that which is inadmissible." *9 F.3d at 1156.* Reliance on such a presumption is particularly appropriate in the present case, where the military judge stated that he made his own determination as to the victim's credibility after he had observed her in-court testimony and the testimony of appellant. In that regard, we note the military judge's statement that, in his view, the victim "was not lying nor was she manipulated in this courtroom" and that he "found her to be totally credible."

III. CONCLUSION

The military judge made it clear that he would not consider Ms. Crossley's testimony for the truth of what the victim may have told her and he emphasized that he was giving "very little weight" to Ms. Gilliam's testimony. In that context, and in the setting of a judge-alone trial where the military judge was able to assess the credibility of the victim, we agree with the court below that any error in admission of the statements at issue was not prejudicial.

IV. DECISION

The decision of the United States Navy-Marine Corps Court of Criminal Appeals is affirmed.

APPENDIX B

IN THE UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, DC

K.T. SEFTON R.H. TROIDL
D.A. ANDERSON

UNITED STATES

v.

Stephen A. ROBBINS, 595 30 3973
Hull Maintenance Technician Third Class (E-4),
U.S. Navy

NMCM 97 00652 Decided 17 November 1998

Sentence adjudged 27 September 1996. Military Judge: N.H. Kelstrom. Review pursuant to Article 66(c), UCMJ, of General court-martial convened by Commander, Naval Base, San Diego, CA.

LT SYED N. AHMAD, JAGC, USNR Appellate Defense Counsel
LT JAMES E. GRIMES, JAGC, USN, Appellate Government Counsel
LCDR JOHN A. MAKSYM, JAGC, USNR, Appellate Government Counsel

ANDERSON, Judge:

A military judge sitting as a general court-martial found the appellant guilty, contrary to his pleas, of two specifications of forcible sodomy with a child under the age of 16 years and one specification of dishonorably failing to pay a just debt in violation of Articles 125 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 925 and 934 (1994)[hereinafter UCMJ]. The appellant was sentenced to confinement for 7 years, forfeiture of all pay and allowances, reduction to pay grade E-1, and a dishonorable discharge. The convening authority approved the sentence as adjudged.

We have considered the record of trial, the six assignments of error,[1] oral argument, and the Government's

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[1] I. THE GOVERNMENT FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT APPELLANT COMMITTED FORCIBLE SODOMY.

II. THE MILITARY JUDGE COMMITTED PLAIN ERROR WHEN HE DID NOT EXCLUDE A WITNESS'S TESTIMONY THAT THE CHILD ABUSE ALLEGATIONS WERE CLINICALLY SUBSTANTIATED.

III. THE GOVERNMENT FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT THE APPELLANT DISHONORABLY FAILED TO PAY HIS JUST DEBTS.

IV. THE MILITARY JUDGE COMMITTED PLAIN ERROR WHEN HE DID NOT EXCLUDE A WITNESS'S TESTIMONY THAT SHE BELIEVED THE VICTIM.

V. THE APPLICATION OF ARTICLES 57 AND 58b, UNIFORM CODE OF MILITARY JUSTICE, VIOLATE THE EX POST FACTO CLAUSE WITH RESPECT TO APPELLANT.

VI. THIS COURT, BY REQUIRING ONLY ONE

response. We conclude that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. *See* Art. 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a) and 866(c). We discuss below the assignments of error that warrant further discussion.

Legal and Factual Sufficiency

In his first and third assignments of error, the appellant contends that the evidence is factually and legally sufficient to sustain the convictions for forcible sodomy and dishonorably failing to pay a just debt. The test for legal sufficiency is whether a reasonable factfinder, viewing the evidence in the light most favorable to the prosecution, could find all the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). For factual sufficiency, the test is whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, this court is convinced of the appellant's guilt beyond a reasonable doubt. *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). After carefully reviewing the record, we find that the evidence satisfies both tests, and we are, ourselves, convinced of the appellant's guilt beyond a reasonable doubt.

With respect to the forcible sodomy conviction, the appellant argues that the seven-year old victim, his stepdaughter, was not credible because of the following:

JUDGE OF THE PANEL TO READ THE RECORD OF TRIAL BEFORE THE PANEL ISSUES A DECISION, VIOLATES ITS OBLIGATION UNDER ARTICLE 66, UNIFORM CODE OF MILITARY JUSTICE.

her testimony was rehearsed; she had recanted her initial disclosure of abuse; she had a motive to fabricate; and she was more manipulative than other children her age. We disagree.

Rather than being rehearsed, the testimony of the victim was instead detailed and consistent. She described the appellant's penis as looking like a microphone, sticking out from his body and parallel to the floor; and she stated that when it was in her mouth, it felt like the bottom part had a bone in it and the top part was squishy and hairy. In addition, she reiterated the details of her story to several people at several different times, with little deviation. The occasions when she stated that the incidents occurred (when her mother was at choir practice and when her mother was in the hospital with pneumonia) were also corroborated by her mother.

With respect to the recantation matter, according to expert testimony at trial, recantation is very common in cases of child sexual abuse. More importantly, the victim here admitted to the recantation and explained that it was due to her fear that her mother would report the abuse and her father would go to jail.

Despite the appellant's contention that the victim had a motive to fabricate, we can find none. From the victim's testimony, it was clear that she understood the ramifications that her disclosures would have on her family and that those ramifications upset her. Acknowledging that it would be sad to see her father go away for a long time, she nonetheless understood that what he did to her was wrong and that it was important to tell the truth. Her lack of a motive to fabricate and her childlike sense of justice merged in the following testimony about her father: "[I]f

he has to go to jail, . . . if they could like, get him to go to the doctor everyday for them to check his brain." Record at 158. We note further that in the appellant's own testimony before the court, he could articulate no apparent motive for his stepdaughter to lie. Although there was testimony that the victim was more manipulative than other children her age, this characteristic provided virtually no impact on her credibility on the sodomy charges.

Expert testimony also served to corroborate the victim. One expert testified that certain conduct exhibited by the victim -- tantrums, bedwetting, disobedience, and nightmares -- was consistent with that of children who have been abused. In addition, another expert testified that oral sex was not something that a seven-year old generally has information about.

Finally, we note that at the conclusion of the trial, the military judge provided this favorable assessment of the victim's credibility:

> First and foremost, I want to say that all of the children who testified in this case were, in the court's view, being absolutely truthful. They were all wonderful, bright, respectful, honest children, [the victim] especially so. She's a wonderful little girl who loves her stepfather even today. She was not lying nor was she manipulating in this courtroom in the court's view. I found her to be totally credible. Even her recantations are easily explainable in this case considering the family and church pressure which she must

> have had to endure, whether perceived or real.

Record at 864.

After reviewing the record, we are convinced beyond a reasonable doubt, both legally and factually, that the appellant forcibly sodomized his stepdaughter.

With respect to the dishonorable failure to pay a just debt offense, the appellant contends that the Government failed to prove that his conduct was dishonorable. We disagree. To be found guilty of this offense, the appellant's conduct must be characterized by deceit, evasion, false promises, or other distinctly culpable circumstances indicating a deliberate nonpayment or grossly indifferent attitude toward one's just obligations. *See United States v. Polk, 47 M.J. 116, 120 (1997).* We find not only evidence of deliberate nonpayment and a grossly indifferent attitude toward the debt, but also evidence of evasion and a false promise.

In March 1995, the appellant became indebted to the Navy Lodge for $ 668.40 in lodging expenses. During his stay in the Navy Lodge, the appellant talked to the manager about the debt, and he promised the manager that he would take care of the amount in full before he checked out. He then surreptitiously vacated the Navy Lodge without checking out or paying his account. Shortly thereafter, the Navy Lodge informed the appellant by letter of the amount due and owing. When the letter failed to prompt payment, telephonic contact was made with the appellant's command on several occasions, over an extended period of time, to obtain payment. In May 1996, the Navy Lodge, having filed a government form requesting an involuntary payroll deduction from the appellant's account to satisfy the debt,

obtained $ 68.40 of the amount due. At the time of trial in late September 1996, a balance of $ 600.00 remained on the debt.

From March 1995 through February 1996, the evidence of record shows that the appellant was being paid regularly by the Navy. His wife also testified that after they left the Navy Lodge, they would sometimes rent cars twice a month for transportation and each rental would require a $ 200 cash deposit. In addition, a senior enlisted petty officer testified that he spent a considerable amount of time working with the appellant to assist him with housing and his finances, but the appellant would not follow the petty officer's advice.

We find that the appellant's failure to pay his Navy Lodge bill was characterized by evasion and a false promise, and was in bad faith. Consequently, based on our review of the evidence, we are convinced beyond a reasonable doubt, both legally and factually, that the appellant dishonorably failed to pay a just debt to the Navy Lodge.

Testimony That Child-Abuse Offenses Were Clinically Substantiated

In his second assignment of error, the appellant contends that the military judge committed plain error when he did not exclude a social worker's testimony that the child-abuse allegations were clinically substantiated. We disagree.

During the Government's case-in-chief on the merits, a clinical social worker from the Navy's Family Advocacy Program who had interviewed the child victim was called to testify. In leading up to her testimony about the contents of that interview, she explained the nature of the Family

Advocacy Program and how claims are substantiated under the Program. Specifically with respect to this case, she stated the following: that the child's mother had called to report a case of abuse; that she had then interviewed the mother, the father, and the child; and that she presented this evidence to the Family Advocacy Case Review Committee (a panel of clinical practitioners). The committee then reviewed this evidence and determined that the abuse was clinically substantiated. The importance of this determination was that once the case was substantiated, a treatment program for the victim and perpetrator could be designed. The defense specifically had no objection to this testimony.

If the testimony about the results of the Family Advocacy Case Review Committee had been offered as an evaluation of the truthfulness of the victim's story, it unquestionably would have been inadmissible as an improper usurpation of the factfinder's exclusive function to weigh the evidence and determine credibility. *United States v. Birdsall, 47 M.J. 404, 410 (1998).* Our superior court "has made [it] clear that child-abuse experts are not permitted to opine as to the credibility or believability of victims or other witnesses." *Id.* In our review of the record, however, we conclude that this matter was not offered for the truth of the results of the Family Advocacy Case Review Committee. Rather, it was offered as a serial recapitulation of the progress of the case through Family Advocacy. In essence, it was offered as general non-hearsay background information -- information that was clearly intended to explain the referral process for treatment and to serve as foundational matter for a later hearsay exception necessary to admit the contents of the social worker's interview with the victim. MIL. R. EVID. 803(4), MANUAL FOR COURTS-MARTIAL, UNITED STATES (1995 ed.)(statements made for the purposes of medical

diagnosis or treatment are an exception to the hearsay rule). Accordingly, we find no error in its admission.

Even if there were error in its admission, we find no prejudice and no plain error. Art. 59(a), UCMJ, *10 U.S.C. § 859*(a); *United States v. Powell, 49 M.J. 460 (C.A.A.F. 1998)*. We have no doubt that the military judge applied the law correctly and considered only appropriate matters in determining the findings. "[A] military judge is presumed to know and apply the law correctly." *United States v. Raya, 45 M.J. 251, 253 (1996)*(also noting that, "plain error before a military judge sitting alone is rare indeed."). During closing argument on findings, the military judge even stated that he would "give very little weight to [the social worker's entire] testimony." Record at 781. Indeed, throughout the trial, the military judge was particularly diligent in ensuring that only admissible evidence was brought before the court. Record at 157 (If the testimony ventures "into any sort of uncharged misconduct that would be impermissible for me to consider, I will disregard it."); Record at 248 ("I can totally disregard any impermissible use of that information."); Record at 464 (social worker's case notes found inadmissible); Record at 480 ("I'm not going to listen to profile evidence counsel."); Record at 215-217, 515-524 (videotape of victim interview found inadmissible); Record at 533 ("Well, if what you are getting at is child development, why don't you ask her specifically about child development, and don't even get into any issues of credibility, because I agree with Lieutenant [Y] that the form of that question suggested, maybe, a credibility prong, and I'm going to sustain it as to the form."); Record at 703 ("I wouldn't allow him to testify he believes him."). We are confident that the military judge properly considered the testimony about the results of the Family Advocacy Case Review Committee -- not for the truth of those results but for the limited purposes of explaining the progress of the

case through Family Advocacy and of providing the foundation necessary for a medical treatment hearsay exception.

Witness Testimony on Credibility of Victim

In a fourth assignment of error, the appellant contends that the military judge committed plain error when he failed to exclude a witness's testimony that she believed the victim. We disagree.

At issue here is the testimony of a witness to whom the child victim disclosed the abuse that precipitated the charges in this case. The contested testimony is as follows:

Q. After [the child] had disclosed these things to you, what happened over the course of the next week?

A. I didn't know what to do or who to tell 'cause

Q. And why was that?

A. At that point I did not know the whole story. All I knew was what she told me, and I -- that the two people that I would have told she said knew. Therefore, who was I going to tell? I tried to call the bishop. I couldn't get through to him. So, therefore, I was left in just -- I felt like I was in turmoil for a week 'cause I really didn't know what to do and who to tell. So --

Q. Did you think [the child] was lying about what she told you?

A. No. It didn't sound like a lie. It didn't sound like it was made up. It didn't sound like it was rehearsed.

Record at 340.

As we noted earlier, commentary on the credibility of the victim's story in a child-abuse case is prohibited. *Birdsall, 47 M.J. at 410; see also* MANUAL FOR COURTS-MARTIAL, UNITED STATES (1995 ed.), app. 22, at A22-48 (witness not permitted to testify as to opinion on guilt or innocence of accused); *United States v. Cameron, 21 M.J. 59, 63 (C.M.A. 1985)*(opinion evidence on truthfulness of particular witness is inadmissible). Contrary to the appellant's contention, however, that is not what occurred here. Prior to the aforementioned testimony, the Government had attempted to offer the statements that the victim made to this witness as an excited utterance and failed. As a result, the Government then decided only to offer the statements, not for the truth of the matter, but to show what actions the witness took in reaction to the statements. Record at 338. Because the statements were not offered for the truth of the matter asserted, we find no error in this testimony.

***Ex Post Facto* Application**

In a fifth assignment of error, the appellant contends that he is entitled to forfeitures taken and pay lost as a result of the *ex post facto* application of Articles 57(a) and 58b, UCMJ, *10 U.S.C.* § § *857*(a) and 858b. Our superior court has addressed the appellant's concerns in *United States v. Gorski, 47 M.J. 370, 374-75 (1997),* and *United States v. Mooney, 47 M.J. 496, 497 (1998).* The problem and the remedy are administrative in nature and do not affect the approved sentence. We provide for any necessary relief in our decretal paragraph.

Accordingly, we affirm the findings and sentence, as approved on review below. We return the record of trial to

the Judge Advocate General of the Navy for any administrative action that might be required.

Senior Judge SEFTON and Judge TROIDL concur.

APPENDIX C

U.S. AIR FORCE COURT OF CRIMINAL APPEALS
Before
YOUNG, SPISAK, and SCHLEGEL
Appellate Military Judges

UNITED STATES, Appellee
v.
Staff Sergeant CHRIS D. LITTLEWOOD,
United States Air Force, Appellant

ACM 32763

OPINION OF THE COURT

SPISAK, Judge:

The appellant pled guilty to one specification of committing indecent acts with KL, a child under 16, and not guilty to communicating indecent language to KL, taking indecent liberties and committing indecent acts with KL and SL, also a child under the age of 16. Article 134, UCMJ, *10 U.S.C. § 934*. A military judge convicted him of all four specifications. The military judge sentenced the appellant to receive a dishonorable discharge, be confined for 16 years, forfeit all pay and allowances, and be reduced to E-1. The appellant raises four errors for our consideration: (1) the military judge violated his due process rights by knowingly and intentionally admitting hearsay and credibility testimony during findings; (2) the military judge erred by permitting the appellant's commander to provide his personal characterization of the

offenses; (3) the military judge erred by permitting an expert witness to testify that she believed the two young victims were truthful; and (4) the appellant's sentence is inappropriately severe. We find that the military judge did err by admitting hearsay and opinion testimony. We need not address appellant's due process argument. We will set aside Specification 4, and reassess the sentence.

I. BACKGROUND

In February 1997, SL, the 9-year-old daughter of the appellant's former wife, told her mother, Ms Everett, that the appellant had touched her in a "bad" way. Ms Everett reported the incident to the Missouri Social Services Agency. SL told a social worker that when she was staying with her half-sister and the appellant, they had slept in the same bed with the appellant. During the night, SL awoke because the appellant had his pants down and was rubbing "his private, and it was big, on her private." The social worker interpreted this to mean that the appellant had rubbed his erect penis on SL's vagina. The social worker notified the Air Force Office of Special Investigations (AFOSI) of the allegations.

An AFOSI agent interviewed the appellant's natural daughter, KL, who lived with the appellant on Whiteman Air Force Base, Missouri. In the first interview, KL denied that the appellant had done anything inappropriate to her. However, in a subsequent interview in her home, KL related numerous occasions on which the appellant had touched her vagina, asked her to perform fellatio on him, rubbed his penis between her legs until ejaculation, touched her breasts, and shown her pornographic movies.

When interviewed by AFOSI agents, the appellant at first denied remembering any such incidents. However, he ultimately admitted touching and rubbing KL's vagina,

licking KL's vagina, kissing KL's breast, kissing KL on the mouth, putting his penis between KL's legs until he ejaculated, and watching adult movies with KL. He said he "didn't remember" doing anything to SL.

At trial, the government called a number of witnesses including the victims' mother, Ms Everett, the mother's friend, Ms Leffler, and a social worker, Ms Silvy.

Trial counsel asked Ms Everett if she believed her daughters, KL and SL, were telling the truth about the allegations. Trial counsel also asked Ms Everett what SL had told her about the allegations. Defense counsel vigorously objected to both questions, but the military judge permitted Ms Everett to answer.

Following cross-examination, the military judge asked Ms Everett:

Q: Ma'am, do you have any information at all that would lead you to believe that [KL] or [SL] are lying about what happened?

After Ms Everett left the stand the military judge stated:

> I would like to clarify one thing about my last question of the witness and then the previous objections to the witness stating an opinion about the truthfulness of her daughters and I understand my role as the fact finder, and to the extent the witness was stating an ultimate opinion regarding the truthfulness of the allegations, I am disregarding her testimony. In part, I permitted the question of her and I asked the question myself to provide some catharsis for this witness in her testimony, because, it was obvious in observing her during her testimony that she was experiencing some distress over the situation.

Ms Leffler was present when SL reported the allegations to Ms Everett. During Ms Leffler's testimony, the trial counsel again asked what SL had told her mother. Defense counsel again objected to the hearsay nature of the testimony; however, the military judge permitted the witness to answer. Following Ms Leffler's testimony the military judge said:

I'd like to say that I overruled your hearsay objections with the same thought in mind for this last witness as I had in mind with the mother [Ms Everett], and all too often, to the lay person in the courtroom, observing or participating as a witness, feels an alienation from the law because they don't understand the technical objections that are being made, and I would like to avoid that response to the extent consistent with the proper conduct of this court, and with in (sic) the bounds of the law and fairness. What I am saying is that I'm sensitive to how these witnesses are reacting and I don't want to further alienate them from the legal system by ruling on objections in a legalistic and technical fashion that makes this court seem like an insensitive and mechanical function. At the same time, I want counsel to understand that I understand the relative relevance of the testimony the hearsay nature of what was being said, and the lack of relevance of that testimony regarding the ultimate truthfulness of the hearsay statements.

Finally, trial counsel asked Ms Silvy, who had been qualified as an expert witness, whether she believed the two victims were actually molested by the appellant. Defense counsel did not object to this question.

II. HEARSAY

Military Rule of Evidence (Mil. R. Evid.) 801(c) defines hearsay as ". . . a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Such evidence is inadmissible unless an exception applies. Mil. R. Evid. 802. However, the admission of hearsay will not be error in the absence of timely objections. Mil. R. Evid. 802, Drafters' Analysis. *See* Mil. R. Evid. 103(a); *United States v. Trisler, 25 M.J. 611 (A.C.M.R. 1987)*. Where, as here, the declarant is available to testify, certain exceptions found in Mil. R. Evid. 803 may permit the hearsay declaration to be admitted.

In the case before us, no one contends that any exception to the hearsay exclusion applies. Rather, the government appellate counsel argue that the testimony of Ms Everett and Ms Leffler concerning what SL told them was not hearsay because it was not offered to prove the matter asserted (i.e., that SL was indecently assaulted), but to show how the allegations came to light. Indeed, that was the explanation given by trial counsel to counter the defense hearsay objection. However, if that were the reason for presenting the evidence, trial counsel needed only to elicit from Ms Everett the facts surrounding the revelations from SL, not the words of those revelations. Moreover, the military judge's explanation of his ruling convinces us that he saw the testimony as inadmissible hearsay, as do we.

Under these circumstances, we can reach only one viable conclusion, the military judge abused his discretion by admitting the hearsay testimony of Ms Everett and Ms Leffler.

III: OPINION TESTIMONY

The appellant asserts that the military judge improperly admitted Ms Everett's testimony that she believed SL and [*8] KL, and the expert opinion of Ms Silvy that the two girls were actually molested by the appellant. He also complains about the question the military judge asked Ms Everett concerning the truthfulness of KL and SL.

Decisions by a military judge on the admissibility of evidence are reviewed for a clear abuse of discretion. *United States v. Zakaria, 38 M.J. 280, 283 (C.M.A. 1993).* An abuse of discretion is action that is arbitrary, clearly unreasonable or clearly erroneous. *United States v. Travers, 25 M.J. 61 (C.M.A. 1987).* If error is found, this court tests for prejudice. Article 59(a), *10 U.S.C.* § *859*(a); Mil. R. Evid. 103.

a. Evidence of Truthfulness

The government contends that the testimony of Ms Everett and Ms Leffler was neither admitted nor used for that purpose. They base their argument, in part, on the fact that the military judge sustained one objection to a question concerning the victims' credibility and in part on the judge's assertion that he understood the law and was merely trying to provide the witness a "catharsis."

Catharsis or not, as the government concedes, one witness may not offer an opinion on the truthfulness of the testimony of another witness. *United States v. Petersen, 24 M.J. 283, 284 (C.M.A. 1987).* While the credibility of a witness may be attacked or supported by opinion testimony, that opinion may refer only to the witness' character for truthfulness, not whether she is telling the truth about a particular event. Mil. R. Evid. 608(a). The military judge's own explanation of why he permitted Ms Everett to give

her opinion indicates that even he believed the testimony to be inadmissible. Under these circumstances we find that admission of Ms Everett's opinion testimony was clearly erroneous.

b. Expert Opinion that Appellant Molested the Victims

Government counsel urge us to find that defense counsel's failure to object at trial when Ms Silvy was asked if she thought the appellant had "actually molested" the two girls, forfeited this issue. However, it matters not whether the issue is raised at trial, for the first time on appeal, or is noticed by the court during its review under Article 66(c). We will reverse if there is (1) error, (2) that is prejudicial to the accused's substantial rights, and (3) under all the circumstances of the case, taken as a whole, the error was not harmless. *United States v. Ruiz, 50 M.J. 518, 525 (A.F. Ct. Crim. App. 1998).*

A person with "specialized knowledge" may testify as an expert to aid the factfinder in understanding the evidence. Mil. R. Evid. 702; *United States v. Meeks, 35 M.J. 64 (C.M.A. 1992); United States v. Partyka, 30 M.J. 242 (C.M.A. 1990); United States v. Benedict, 27 M.J. 253 (C.M.A. 1988); United States v. Snipes, 18 M.J. 172 (C.M.A. 1984).* Expert testimony may not, however, be used to determine the credibility of a victim, and an expert may not opine as to the guilt or innocence of an accused. *United States v. Harrison, 31 M.J. 330 (C.M.A. 1990); United States v. Arruza, 26 M.J. 234 (C.M.A. 1988), cert. denied, 489 U.S. 1011, 103 L. Ed. 2d 183, 109 S. Ct. 1120 (1989); Petersen, 24 M.J. 283.*

This case is remarkably similar to *United States v. Birdsall, 47 M.J. 404 (1998),* where a government expert in pediatrics was asked: "In your opinion, Doctor Hickey, are these children the victims of child sexual abuse?" The

Court of Appeals for the Armed Forces (CAAF) concluded that error occurred because a doctor's opinion as to whether or not a child has been sexually assaulted is "ordinarily neither useful to the jury nor admissible." *Id, at 404 (quoting United States v. Whitted, 11 F.3d 782, 785 (8th Cir. 1993))*. Here, the question asked was even more pointed; not merely whether or not the children had been assaulted, but whether or not the appellant was their assailant. We find that such testimony, even from an expert, is inadmissible and error did occur.

IV. PREJUDICE-

We must now determine whether the errors noted above prejudiced a substantial right of the appellant and, if so, whether the error was harmless. *Ruiz,* slip op. at 9; Art. 59(a), UCMJ, *10 U.S.C.* § *859*(a). To make this determination, we look to the record as a whole. The test for determining specific prejudice weighs the government's evidence against the defense theory of the case; the materiality of the evidence presented; and the quality of any evidence excluded. *United States v. Weeks, 20 M.J. 22, 25 (C.M.A. 1985).*

The issue of whether or not the appellant sexually abused KL was well supported by other evidence, including the appellant's confession and his plea of guilty to Specification 1, committing indecent acts with KL. However, the only evidence in support of the abuse of SL came from SL. Having SL's mother and friend testify to her exact words when she reported the incidents to them and to her truthfulness served only to improperly vouch for her credibility. Having an "expert" assert that in her opinion the appellant had sexually molested SL was crucial to the government's case and clearly bolstered the testimony from SL. Additionally, the military judge permitted trial

counsel to emphasize Ms Silvy's opinion in his closing argument.

In the absence of clear evidence to the contrary, we ordinarily presume a military judge both knows and will follow the law. *United States v. Mason, 45 M.J. 483 (1997); United States v. Montgomery, 20 U.S.C.M.A. 35, 42 C.M.R. 227, 231 (C.M.A. 1970); United States v. Goldsmith, 29 M.J. 979, 985 (A.F.C.M.R. 1990).* Here, however, the military judge did not follow the rules of evidence with regard to the hearsay and opinion testimony from Ms Everett and Ms Leffler. Rather, we are faced with several errors and the appearance that the military judge was more concerned about the feelings of the witnesses than the fairness of the trial. Under these circumstances we are compelled not to follow the normal presumption.

We find this case "falls . . . within the ambit of the doctrine of cumulative error--under which a number of errors, no one perhaps sufficient to merit reversal, in combination necessitate the disapproval of a finding." *United States v. Walters, 4 U.S.C.M.A. 617, 16 C.M.R. 191, 209 (C.M.A. 1954). See also United States v. Banks, 36 M.J. 150, 170-71 (C.M.A. 1992).* However, even if the hearsay and opinion testimony were excluded, there is compelling evidence to support the allegations contained in the first three specifications (i.e., that the appellant committed indecent acts, and took indecent liberties with KL, and that he communicated indecent language to KL). We are satisfied beyond a reasonable doubt that the appellant was properly convicted of these offenses. However, we are not so convinced with regard to Specification 4. After carefully considering all that happened and after stripping the erroneous action from the whole, we cannot say that the finding of guilty to Specification 4 was not substantially swayed by the many

errors we have noted. *United States v. Yerger, 1952 CMA LEXIS 833, 3 C.M.R. 22, 24 (C.M.A. 1952).*

A military judge must not only do justice, he also must appear to do justice. By totally disregarding the rules of evidence, this military judge deprived the appellant of a fair hearing on the issue of his guilt of molesting SL. Therefore, the finding of guilty to Specification 4 is set aside and dismissed.

V. REMAINING ISSUES

We find no merit in appellant's complaint concerning his commander's testimony. Because we have set aside the finding of guilty to one specification, we will reassess his sentence below. Therefore, his assertion that his sentence is inappropriately severe is now moot.

VI. CONCLUSION

We must now reassess the appellant's sentence. We may reassess a sentence instead of ordering a rehearing if we "confidently can discern the extent of the error's effect on the sentencing authority's decision." *United States v. Reed, 33 M.J. 98, 99 (C.M.A. 1991).* Therefore, we must "first determine what sentence the court-martial would probably have adjudged if the error had not been committed at trial." *United States v. Peoples, 29 M.J. 426, 427 (C.M.A. 1990).* We do that by putting ourselves in the shoes of the sentencing authority. To do so, we can only consider the evidence that was before the sentencing authority at trial. After we reassess the sentence, we must consider the entire record and the allied papers in performing our statutory duty to determine whether the sentence is appropriate. *Id. at 427.* We are satisfied that we can make this determination.

Having considered both the number and seriousness of appellant's offenses and having given appropriate consideration to his prior service and military character, we approve only so much of the appellant's sentence as calls for a dishonorable discharge, confinement for 12 years, forfeiture of all pay and allowances, and reduction to E-1.

We find that the findings, as modified, and the reassessed sentence are correct in law and fact and, accordingly, are

AFFIRMED.

Senior Judge YOUNG and Judge SCHLEGEL concur.